

## **REMARKS**

Claims 1-4, 8-10 and 25-37 appear in this application for the Examiner's review and consideration. Of these, claims 1-2, 9, 25-37 were previously presented while claims 3-4, 8 and 10 are original. No claim amendments are being made at this time, and applicants traverse the rejections.

### **Claim Rejections – 35 U.S.C. § 103(a)**

#### **A. There is No Motivation to Combine the References or Suggestion of the Claimed Invention**

Claims 1-4, 8, 10, 25-28, and 30-33 remain rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 2,106,893 to Krein ("Krein") in view of EP 0276333 to D'Amato (D'Amato) and EP 0848910 A2 to Kuehl et al. ("Kuehl") for the reasons stated in the Office Action of September 25, 2007.

Krein discloses a method for coating a confection by spraying the coating material into a temporary wrapper, placing the confection within the lining, and allowing the confection to harden within the temporary wrapper. Krein uses a paper temporary wrapper, which is strippable from the confection, and contains overlapping, ungummed portions. Krein expressly states that an important consideration in choosing the material from which the wrapper is made, is that the material be cheap, as the wrapper is to be discarded at the time the confection is eaten (Page 1, lines 34-38).

D'Amato is directed to a cone-shaped plastic container for housing ice cream, and a cover made of the same material, allowing a consumer to view the ice cream package prior to stripping the packaging. D'Amato appears to also be cited for its teaching of a container and lid that consist of a liquid-tight, transparent material to make a package of ice cream visible to the consumer (Abstract). Damato also appears to teach advertising on the material (FIG. 3).

Kuehl discloses a chocolate coating having a marbled appearance. Kuehl is concerned with ice cream bars coated with chocolate having a marbled appearance (Examples 1-6). The coating is prepared from a coating material, which may be chocolate, or a water-based material such as creamy mixes, non-aerated ice cream mixes, sorbets, water ices, or fruit purees. Kuehl teaches that coatings in which one layer consists of either milk or plain chocolate and the other layer consists of white chocolate are the most interesting visually

because there may be a marked contrast between the milk or plain chocolate and the white chocolate.

Specifically, the Examiner states that Krein teaches a fat-based shell which is in surface-to-surface contact with the packaging sleeve and that the shape of the sleeve corresponds to the shape of the outer surface of the shell. The Examiner further characterizes D'Amato as teaching the use of transparent packaging for housing conical frozen confections, such that the confection is viewable by the consumer through the packaging. With respect to Krein, the Examiner further states that Krein teaches a highly attractive two-tone effect, such that it would have been obvious to a person having ordinary skill in the art that using transparent packaging would allow a consumer to view and inspect the attractive color effect on the shell prior to purchase. The Examiner further cites Kuehl for its teaching of a marbled confectionary coating that includes several colored layers providing an attractive appearance and a smooth surface. The Examiner thus concludes that it would have been obvious for one of ordinary skill in the art to use the transparent foil packaging of D'Amato for packaging the confection of Krein and Kuehl, such that the confection has an interesting visual effect, and is viewable through the packaging, thus improving the marketability of the product.

On page 8 of the Office Action dated April 29, 2008, the Examiner states that "Applicants further assert that Krein's mere recognition of the attractiveness of a two-toned effect of combining chocolate and ice cream does not constitute motivation for combination with Cummings to result in the present invention." Applicants respectfully submit however, that Applicants' argument on page 9 of the Amendment dated January 22, 2008 addressed the lack of motivation to combine Krein and D'Amato to result in the present invention, and not the lack of motivation to combine Krein and Cummings. Indeed, Cummings was neither cited nor referenced anywhere in the September 25, 2007 Office Action or the January 22nd response thereto.

The Examiner ultimately concludes that the teachings of Krein provide motivation for combination with D'Amato, due to the highly attractive color and two-toned effect of the cone, which is viewable by the consumer after the product is unwrapped (See April 29, 2008 Office Action, page 9, paragraph 15). The Applicants will explain why this conclusion is incorrect.

**i. There is no motivation or suggestion to combine Krein and D'Amato**

The Examiner's rejection of the pending claims based on these three prior art references is in error because the presently disclosed invention is neither taught nor suggested in the disclosure in any of these references, so that the present claims cannot be rendered obvious by the references. While Krein may teach a two-toned effect created by the combination of chocolate and ice cream, the disclosure of Krein is primarily concerned with an economical method of making a frozen confectionary package wherein the coating material is sprayed onto a temporary wrapper confection to form a lining, after which the confection is placed within the lining, hardening therein (Page 1, lines 25-38). The wrapper is peeled from the confection at the time of consumption (Page 1, lines 20-25 and 35-44).

The Examiner is unpersuaded by Applicants' argument that Krein was concerned with keeping costs down when opting to use a paper wrapper (April 29, 2008 Office Action, page 6, paragraph 12). Specifically, the Examiner states that "cheap and economical are not one in the same, since a material that is economical does not have to be cheap, and a material that is cheap is not necessarily economical (*id.*). While a "cheap" material and an "economical" material may not always be the same, it is apparent from the disclosure in Krein that he was concerned with devising a method for production of an ice confection package that was not cost-prohibitive with regards to mass commercial production. Indeed, the disclosure of Krein is replete with references to economical motivations resulting in his invention. For example, Krein states that "it has not as yet been possible to line a wrapper of paper, for example, with chocolate, and freeze a confection ... with sufficient facility and economy to warrant commercial production..." (Page 1, lines 25-30). Krein also states that in commercial manufacture of confections, "simplicity, ease of handling, and economy are very highly desirable, if not essential" (Page 1, lines 21-23). Krein further states that individual manufacture and production of confection packages is "so *expensive* (emphasis added) and laborious as not to be feasible, in most cases, for commercial manufacture" (Page 1, lines 18-21). Accordingly, it is clear from the disclosure in Krein that minimizing production costs was an integral concern in the development of his invention, and that there is no concern or motivation to prepare a packaged product that includes clear plastic to highlight and exhibit the product therein.

There is no motivation in Krein to combine the teaching therein with that of D'Amato, such that Krein's ice confection is enclosed in the transparent packaging sleeve of D'Amato. The Examiner insists that Krein is indeed concerned with the appearance of his ice cream product, as Krein notes the two-tone and attractive color effect produced upon stripping away the wrapper (See Office Action, page 9, first full paragraph). However, as previously explained in Applicants response of January 22, 2008, Krein's mere recognition of this attractive appearance which is viewable only after the consumer has stripped away the wrapper does not constitute motivation for a person of ordinary skill in the art to combine with D'Amato.

Indeed, if the appearance of the confectionary product were truly of concern to Krein, he would have chosen a packaging material that is partially or entirely transparent, such that the consumer could view the product therein, before stripping away the wrapper. Transparent packaging wrappers were known and available at the time of Krein's disclosure. However, as Krein's concerns centered around feasibility of manufacture and ease of removal of the wrapper, he chose to use paper in the manufacture of his wrapper. This is confirmed in paragraph 19 of the Rule 132 Declaration of Alain Leas, which was previously submitted on July 2, 2007 (the "Leas Declaration").

While a plastic wrapping as taught by D'Amato may be conventionally used in the art for the purpose of viewing the contents within (see April 29, 2008 Office Action, page 9, paragraph 15), it is not used solely for that purpose in the present invention. Instead, the clear sleeve is used as a mold for the shell, because this results in a smooth and shiny shell exterior. This feature is desirable so that the clear plastic sleeve is intended to make it visible to consumers. As neither Krein nor D'Amato are concerned with this product feature, there is simply no motivation to combine Krein's shell with D'Amato's packaging to result in the present invention.

In particular, D'Amato discloses a cone-shaped plastic container for housing ice cream, and a lid that is fitted for closing the conical opening of the container (Leas Declaration, paragraph 8). Both container and lid consist of a liquid-tight, transparent material, such that the package housed therein is viewable by the consumer (Leas Declaration, paragraph 8). Further, D'Amato's ice confection is prepared outside the packaging, and thereafter placed in the packaging, such that there is no complete surface-to-surface contact

between the ice confection and the packaging (D'Amato, Figures 2 and 3; Leas Declaration, paragraph 8). There also would not be a smooth exterior surface of the shell as in the present invention, since there is no disclosure in D'Amato that his plastic packaging may be used in forming the cone, as is the case in the presently claimed invention

D'Amato's disclosure is primarily concerned with facilitating transportation of the ice confectionary without damage thereto, enabling the consumer to view and inspect the ice confection through the packaging, prior to unwrapping and consumption, and ease of handling the ice packaging during consumption, such that it does not melt as quickly. This is clear from the translated portion of D'Amato (copy submitted with response of January 22, 2008), that explains that the plastic packaging to be used "should be able to withstand small shocks" and be rigid enough to protect the ice package from damage. This most likely means that the air in the package acts as a cushion while the plastic is strong enough to retain the air inside and to avoid tearing of the package or damage to the contents. Further, D'Amato's packaging is designed such that it may be separated at a break line, with the bottom part of the packaging serving as a handle while the ice cream is being consumed, thus preventing the ice cream from melting as quickly, as the warmth from the hand is transferred to the ice cream more slowly (D'Amato, "The lower part of the container prevents the ice cream from rapidly thawing...").

The Examiner characterizes D'Amato as teaching the use of plastic packaging so as to avoid the need for additional pictures or drawings displaying the contents therein, as consumers may directly view the contents through the packaging (Office Action page 7, paragraph 13). Accordingly, the Examiner concludes that the above-recited disclosure provides motivation for combining with Krein's shell, which is in contiguous contact with the packaging sheet, to result in the presently claimed invention. Applicants respectfully disagree for the following reasons.

As explained above, a person having ordinary skill in the art would not be motivated to modify the disclosure in Krein by combining with D'Amato, as Krein is concerned primarily with creating an economical, temporary wrapper that is designed to be stripped prior to consumption, while D'Amato is concerned with providing a means for easy transportation of an ice package, which means is convenient to handle, and which product may be viewed through its packaging. Krein's mere recognition of the attractive appearance of the ice

confection prior to consumption does not provide motivation for combination with D'Amato. As the prior art needs to be considered for all that it teaches and not just for selected portions, there is no motivation whatsoever for a skilled artisan to combine D'Amato and Krein to result in the present invention. It appears that the rejection was made using hindsight reasoning, a procedure that has been roundly criticized by the Court of Appeals for the Federal Circuit in many reported decisions.

**ii. Kuehl is incompatible with Krein and D'Amato**

Kuehl discloses a marbled confectionary coating for a confectionary of ice cream product (See Examples 1-6; Leas Declaration, paragraph 7). The primary purpose of Kuehl is to impart an attractive appearance to its confectionary product. The coating may be prepared from chocolate or a water-based material such as creamy mixes, non-aerated ice-cream missed, sorbets, water ices or fruit purees. Kuehl does not utilize a sleeve that conforms to the outer surface of the confection, and maintenance of a smooth outer surface is not of importance to Kuehl, unlike the present invention, which has a smooth surface and which sleeve is formed in a shape that corresponds to the desired shape of the shell, and which is in complete surface-to-surface contact with the shell (Leas Declaration, paragraph 15). Finally, Kuehl's confectionary product is prefabricated prior to being placed in its packaging, in contrast to the present invention, which is formed in the packaging sleeve.

The Examiner relies on Kuehl for its teaching of a secondary chocolate-based confection used to provide a decorative pattern on a chocolate based shell, D'Amato for its teaching of a transparent packaging used so the consumer can view the contents of the packaging directly, and Krein for its teaching of complete surface-to-surface contact between the shell and the packaging (Office Action, page 10, paragraph 17). However, as none of Krein, Kuehl or D'Amato teach or suggest a fat-based shell that has its entire surface in a pattern of at least two different colored confections and with a smooth outer surface in complete surface-to-surface contact with a packaging sleeve, as recited in independent claims 1, 25 and 34, these claims cannot be obvious over these references. As stated above, the prior art needs to be considered for all it teaches and not just for selected portions. In the present case, there is no motivation for an ordinary skilled artisan to combine these three references, thus rendering claims 1-4, 8, 10, 25-28 and 30-33 non-obvious over the prior art.

As previously explained, a person having ordinary skill in the art would not be motivated to combine D'Amato and Kuehl, as D'Amato is concerned with conical ice cream products, and not ice cream bars, which are the subject of the invention of Kuehl (Leas Declaration, paragraph 16). Further, Kuehl's ice cream bars do not require a separate container and lid, as taught by D'Amato, and Kuehl does not disclose the benefits of using transparent packaging in the manufacture, transport or sale of his confection products (Leas Declaration, paragraph 16). Still further, D'Amato does not appear to teach a chocolate shell, but a wafer cone, unlike Kuehl, which makes no mention of a wafer cone.

A person having ordinary skill in the art would not be motivated to combine the disclosure of Kuehl and Krein, as Krein is primarily concerned with devising an economical means of manufacturing a temporary wrapper which is stripped prior to consumption, while Kuehl is primarily concerned with creating an attractive appearance via marbling on his confectionary or ice cream product. Accordingly, the only way that this rejection can be made is with a hindsight reconstruction of the art using Applicants' disclosure as a guide. For these reasons, Applicants submit that there is no teaching or suggestion to combine the cited references to result in the invention disclosed in the objected to claims, and request the withdrawal of the rejection of claims 1-4, 8, 10, 25-28, and 30-33 under 35 U.S.C. § 103(a).

**iii. There is no motivation or suggestion to combine Kuehl with Newsteder, Palmer and Phillips**

Claims 9, 29 and 34-37 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Krein in view of D'Amato and Kuehl for the reasons set forth in the Office Action of September 25, 2007, in view of U.S. Patent No. 4,778,683 to Newsteder ("Newsteder"), U.S. Publication No. 20030099746 A1 to Palmer ("Palmer"), and U.S. Patent No. 5,035,907 to Phillips et al. ("Phillips"). The Examiner concedes that the combination of Krein, D'Amato and Kuehl does not teach or disclose a decorative pattern design including writing, script, a logo or a symbol (Office Action, page 3, paragraph 5), but states that Newsteder, Palmer and Phillips demonstrate that it is well known in the art to use symbols, logo or writing to impart a design onto a food product (Office Action, page 3, paragraph 5). Accordingly, the Examiner concludes that since Kuehl teaches decorative patterns, it would

have been obvious to modify the pattern of Kuehl to display a message, symbol, writing or logo, thus rendering the invention disclosed in claims 9, 29 and 34-37 obvious.

### **1. Newsteder**

Newsteder is directed to an economical method of producing multi-color chocolate products with fine detail in lettering and design, and sharp color separation (See col. 1, line 67 – col. 2, line 2). A first color chocolate is applied into a mold having a planar upper surface and recesses therein, such that the first chocolate fills the recessed portions, and is allowed to harden. A second chocolate is then applied to the planar upper surface and allowed to harden. The recessed portions of the mold form sharp and distinct angles with the planar surface, and the first chocolate is squeegeed across the planar surface such that the first chocolate is coplanar with the upper surface of the mold. Consequently, a sharp and distinct angle is maintained between the recessed portion and the planar portion of the chocolate, resulting in clean and distinct color transition between the first and second color chocolates.

In sharp contrast to the present invention, the disclosure of Newsteder focuses on chocolate bars instead of cones. Further, the bars are formed in a mold, as opposed in a packaging sleeve, as is the case in the presently claimed invention, wherein the fat-based shell with distinctive patterns thereon, is formed within the packaging sleeve, such that the entire shell is in surface-to-surface contact with the packaging. Indeed, there is no mention of packaging at all in Newsteder, as he is primarily concerned with maintaining a clean and distinct color separation and definition between differently colored chocolates. Still further, Newsteder's chocolate bars do not have a smooth outer surface, as does the shell of the presently claimed invention. Newsteder's chocolate bars have writing which is in a different plane from the remainder of the bar, which is formed due to the recessed portions of the mold, in to which the first chocolate is poured (See Figures 15-19). Also, there is no suggestion or disclosure in Newsteder that his method of forming the multi-colored chocolate product would even be effective when forming a cone. Based on the disclosure, it is clear that Newsteder is focused on creating a chocolate product with more than one color, where there is a sharp separation between the colors.

There is no motivation for a person of ordinary skill in the art to combine Kuehl with Newsteder, to result in the presently claimed invention. The Examiner states that since Krein



teaches decorative patterns, it would have been obvious for the ordinary-skilled artisan to modify the disclosure of Kuehl, based in part on the teaching of Newsteder, to result in the shell of the present invention containing a writing, script, a logo or a symbol (Office Action, pages 3-4, paragraph 5). Applicants respectfully disagree.

As explained above, Kuehl teaches a marbled confectionary coating for an ice confection or ice cream product. Kuehl is concerned with creating an attractive marbled appearance using a coating material which may be chocolate, resulting in suitable adhesion between the different layers of chocolate (page 2, lines 16-19). Further, there is no mention in Kuehl of the benefits or advantageous aspects of “clean” color separation between the different coating materials, or the maintenance of a distinct transition between differently hued chocolates. Kuehl claims a coating material, used to cover various foods including ice cream.

In marked contrast, Newsteder’s disclosure concerns the manufacture of actual chocolate bars, as opposed confectionary or ice cream products with chocolate coatings. Newsteder’s primary concern is the maintenance of distinct color separation between the differently colored chocolate, through the use of molds with recessed portions, at distinct angles to the planar portions. It would not be obvious to one of ordinary skill in the art to combine the coating chocolate taught by Kuehl, with the chocolate bar taught by Newsteder, as the disclosure of Newsteder and Kuehl are directed to different processes. While Kuehl is concerned with creating an attractive appearance of his chocolate, the designs and patterns envisioned by Kuehl are random in nature (See page 2, lines 20-23, “‘marbled appearance’ ... may include patterns or appearances such as marbled, mottled ... dappled, clouded, drizzle ... splattered ... speckled ... flecked ...”). As such, an emphasis on sharp color transitions or distinction is neither disclosed or suggested. In stark contrast, the lettering produced by Newsteder has “very fine detail” and “sharp color separation” (See col. 1, line 67 – col. 2, line 6). Further, Kuehl does not disclose any advantages in providing writing or a logo by his process, and at best makes contrasting colors in the forms of strips, lines or dots. No combination of the cited art discloses the embodiment of the invention defined in claims 9, 29 and 34-37. In contrast, in the present invention, the combination of the clear plastic sleeve with the color contrasted writing and smooth surface of the shell unexpectedly provides a product that is interesting in appearance and desirable to customers. No prior art does this.

## 2. Palmer

Palmer discloses a method for manually decorating an edible food with a container delivering a liquid to the food via a nib, which flexes under pressure, such that the food may be decorated without becoming deformed (See Abstract). The foods contemplated in the disclosure are soft foods and easily deformable, including cookies, cakes, breads, crackers, apple slices, and frosting (See paragraphs [0011], [0030], [0032]). Palmer is primarily concerned with improving an individual's ability to decorate an edible food, without deformation of the same (See paragraphs [0007]-[0008], [0010], [0019]). In particular, the disclosure in Palmer focuses on the child-friendly nature of the claimed invention (See paragraph [0019], [0029]).

The teachings of Kuehl and Palmer have no unifying motivation, aside from simply being related to the general idea of food. While Palmer is concerned with the convenient manual application of writing or design on easily deformable foods such as frosting, while maintaining the integrity of the food, Kuehl focuses on the mechanized coating of ice cream bars, to result in a marbled appearance. Palmer makes no mention of ice cream bars or coating one or more layers of a coating material on other layers of coating material to give a marbled appearance, as is disclosed in Kuehl (See Kuehl, page 2, lines 41-47). Further, as stated above, Kuehl does not disclose any advantages in providing writing or a logo by his process, and at best makes contrasting colors in the forms of strips, lines or dots.

Indeed, Kuehl and Palmer teach away from each other, as Kuehl discloses that the coating materials are simultaneously applied onto the confectionary or ice cream product by dipping, enrobing or spraying the coating materials onto the ice cream product (See page 3, lines 20-24). In stark contrast, Palmer's method of creating designs on foods does not involve any of the techniques disclosed by Kuehl. Further, since Palmer's method of imparting design to food consists of manual decoration with a nibbed apparatus, this necessarily implies that the materials imparting the design are not simultaneously applied to the foods, as is taught by Kuehl. In Palmer, any color or design imparted onto the food must be applied one design at a time, and one color at a time.

The ordinary-skilled artisan would not look to Palmer to remedy the deficiencies of Krein, to result in the present invention, as the disclosures of the two inventions are directed at completely differing problems. Palmer is concerned with imparting designs onto soft foods

without deformation of the same. Kuehl, on the other hand, is primarily concerned with imparting an attractive coating onto confections or ice cream products. Further, Kuehl makes no mention of the possibility of deformation of the ice cream products or confectionaries, and is primarily concerned with creating a visually interesting appearance of the ice cream product (Leas Declaration, paragraph 7).

One skilled in the art would not look to modify the teaching of Kuehl with the disclosure in Palmer, as Palmer discloses uncomplicated manual application of a design on the food, and makes no reference to ice creams. Imparting an attractive design onto an ice cream product via a mechanized process is conceptually distinct from and unrelated to manually applying a design on a food without the same deforming. Accordingly, one of ordinary skill in the art would not be motivated to combine Kuehl which discloses the mechanized coating of ice cream products with chocolate resulting in a marbled appearance, and Palmer which discloses the convenient application of design onto edible foods without deformation.

Even if combined, Kuehl and Palmer do not result in the present invention, since neither one teaches a smooth outer shell surface with contrasting colors in a package where the outer shell is visible through the plastic packaging. Thus, no combination of the cited art discloses the embodiment of the invention defined in claims 9, 29 and 34-37.

### **3. Phillips**

Phillips discloses a marshmallow-based overlay formed on a release film which is mounted on a carrier sheet (See Abstract). The release film is subsequently peeled from the carrier sheet, and then the release film is peeled from the overlay. The overlay is then transferred to a pastry to decorate the same (See Abstract). The invention disclosed in Phillips is concerned with the creation of a marshmallow-based overlay which may be easily transported and handled, and which is easily removed from its backing prior to pastry decoration (See col. 1, line 64 – col. 2, line 4). Phillips uses a rigid carrier sheet, a flexible release film mounted on the carrier, and an edible overlay formed in situ on the release film by pouring the marshmallow mixture into a patterned aperture of a stencil initially positioned on the release film (See col. 2, lines 24-55). The mixture is allowed to harden, after which a predetermined design, which could include graphical depictions or words, is printed on the

surface of the overlay (See col. 2, lines 56-61). The overlay is then moistened if needed, prior to being applied to the pastry.

There is no motivation to combine the teachings of Kuehl and Phillips, due to the lack of unifying motivation between the two inventions. While Phillips is concerned with devising a means to manufacture an edible overlay which may be easily transported and handled without breakage, and to prolong the usability thereof, Kuehl is concerned with imparting a pleasing appearance to confections or ice cream bars, by coating with chocolate or other coatings, resulting in a marbled appearance. Kuehl teaches spraying, extruding and enrobing as ways to coat his ice confections, in contrast to Phillips, who teaches placing the overlay on the pastry.

One of ordinary skill in the art would not be motivated to look to the teaching of Phillips to modify Kuehl, as Phillips seems to disclose manual application of the edible overlay on the pastry (See col. 6, lines 29-45). Phillips makes no mention of ice cream products, nor of conventional coating techniques such as those described above, and stated in Kuehl. Indeed, the disclosure in Phillips does not mention coating at all, as his design is applied onto pastry by means of an overlay. In contrast, Kuehl is concerned with the coating of confections and ice cream products with a marbled coating, resulting in the marbled appearance, as opposed to the manual application of an edible overlay with a pre-applied design. Further, Kuehl does not disclose any advantages in providing writing or a logo by his process, and at best makes contrasting colors in the forms of strips, lines or dots. Additionally, of concern to Phillips is the strength of the overlay, and its ability to be transported, handled and applied without breakage. Phillips mentions that “the overlay 40 cannot be peeled from the release film, at least not without damaging the overlay. As previously mentioned, the only reliable way to remove the overlay from the assembly is first to ... peel the release film from the overlay” (See col. 6, lines 46-51). Kuehl makes no disclosure regarding the strength of his chocolate coating, or the ease of transportation or handling thereof, as he is only concerned with creating an attractive marbled coating on his confection or ice cream.

Based on the foregoing, there is no motivation to combine Kuehl, D’Amato and Krein to result in a fat-based shell that has its entire surface in a pattern of at least two different colored confections and with the substantially smooth outer surface of the shell in complete

surface-to-surface contact with a packaging sleeve, as recited in independent claims 1, 25, and 34. Claims 9, 29, and 34-37 are further distinguishable due to the additional feature specifying the types of contrasting patterns, *i.e.*, writing or a logo, in the shell to further aid in advertising or promotion of the product in a manner that is highly simplified over the art. The combination of Newsteder, Palmer and Phillips does not remedy the deficiencies of Krein, Kuehl and D'Amato for the reasons discussed above. Accordingly, Applicants respectfully request withdrawal of the rejection of claims 9, 29 and 34-37 under 35 U.S.C. § 103(a), as there is no teaching or suggestion to combine the cited references to result in the invention disclosed in the objected to claims.

### **Claim Rejections - Double Patenting**

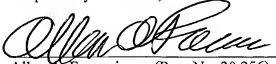
The claims were provisionally rejected for obviousness type double patenting over the claims of copending applications 10/294,764, 10/385,177 and 10/800,222. As the provision has not occurred in any of those applications and since the claims of this application are otherwise allowable, these rejections should be withdrawn. To the extent that any of these provisions occurs prior to the allowance of this application, Applicants will submit an appropriate terminal disclaimer to overcome any obviousness type double patenting rejection. As this has not yet occurred, the provision is satisfied and the rejection is not applicable.

### **CONCLUSION**

In view of the foregoing, it is believed that the Examiner's rejections should all be withdrawn so that the claims can be allowed and the application can proceed to issue.

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Respectfully submitted,



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